IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 384

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, *et al.*,

Petitioners,

vs.

HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF FORREST S. SMITH, TRUSTEE.

JAMES D. CARPENTER,
75 Montgomery Street,
Jersey City 2, New Jersey,
Attorney for Petitioner Trustee

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No. 384

FORREST S. SMITH, Trustee of the property of Hoboken Manufacturers Railroad Company, debtor; the debtor Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a creditor,

Petitioners,

against

HOBOKEN WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and HOBOKEN LAND AND IMPROVEMENT COMPANY,

Respondents.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF FORREST S. SMITH, TRUSTEE.

I.

Opinions Below.

The opinion of the District Court of the United States for the District of New Jersey was filed August 4, 1944 and is reported in 56 F. Supp. 187; also printed (R. 42).

The opinion of the Circuit Court of Appeals for the Third Circuit was filed July 17, 1945 (R. 116); is reported in 150 Fed. (2d) 921.

II.

Jurisdiction.

The jurisdiction of this court is invoked under USC Tit. 28, Sec. 347 (Judicial Code, Sec. 240(a) as amended).

Cases supporting the jurisdiction of this court on certiorari are:

Palmer v. *Commonwealth of Mass.*, 208 U. S. 79;
Warren v. *Palmer*, 310 U. S. 132;
Ecker v. *Western Pacific Railroad Corp.*, 318 U. S. 448;
Institutional Investors v. *Chicago M. St. P. & P.*, 318 U. S. 523.

This Court issued its writ of certiorari October 22, 1945 to review the judgment of the Circuit Court of Appeals for the Third Circuit filed July 17, 1945 (R. 129), which affirmed an order of the District Court for the District of New Jersey dated December 19, 1944 (R. 106) terminating, on petition of the respondents herein (R. 30), a lease dated June 19, 1906, wherein and whereby Hoboken Railroad Warehouse and Steamship Connecting Company leased to the debtor for a period of ninety-nine years the line of railroad of which the petitioner is trustee in reorganization under Section 77 of the Bankruptcy Act. The order terminating the leases was made after the trustee, upon authorization of the court (R. 38), had given the lessor notice adopting and continuing the lease in force (R. 39). Forfeiture of the leasehold was ordered by the District Court because the lease contained a covenant that the lessee would not sell, assign or transfer the lease without the express consent of the lessor, and provided that in the event of the

breach of any covenant in the lease the lessor might sue at law or in equity for breach of the covenant, or by notice in writing terminate the lease and thereupon enter into and upon the demised premises, "free from any right of the lessee, or its assigns, to use the demised premises for any purpose whatever, and thereupon any right, title and interest of the lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made." (R. 32, 33)

The District Court erroneously held that the covenant in the lease was violated by the qualification of the trustee under Section 77 of the Bankruptcy Act, and erroneously held that Section 110b of Title 11, USC, was applicable and operated to terminate the lease upon application of the lessor.

The District Court, at the conclusion of its opinion, said:

> "The motion to terminate the lease granted to take effect upon production to the court of conclusive evidence that the requirements of the lease relating to the continuous operation of the railroad have been complied with" (R. 45).

After this opinion was filed the lessor applied to the Interstate Commerce Commission for authority to repossess and operate the debtor's line of railroad under Section 1 (18) of the Interstate Commerce Act. On December 2, 1944, Division IV of the Commission filed a report holding that since the lessor held a New Jersey charter authorizing it to operate a railroad and had in 1906 executed the lease of the railroad to the debtor, no certificate from the Commission was needed "because the lessor's obligations and duties to the public have never ceased but have merely been performed by the lessee for its benefit, and when the latter

for any reason no longer can perform such obligations, the duties must be performed by the lessor on its own behalf" (R. 56).

Accordingly, the petition of the lessor was dismissed by the Commission (R. 57), and the District Court on December 19, 1944 made the order complained of authorizing and empowering the lessor to serve written notice on the debtor and its trustee terminating the lease at midnight on December 31, 1944, and after service of notice to enter upon the demised premises "and thenceforth hold, possess and enjoy the same free from any rights of said debtor or trustee to use the demised premises for any purpose whatever" (R. 59, par. 1).

After notice of appeal was served (R. 62), application was made to the District Court for a stay pending the appeal (R. 73-79), which was denied on terms that the lessor should not sell, lease, mortgage, or otherwise transfer or encumber the railroad property without the approval and order of the court, etc. (R. 89). On application on notice to the Circuit Court of Appeals, a stay was granted pending the appeal (R. 92); and the trustee has been and now is operating the debtor railroad.

The Circuit Court of Appeals in its opinion likewise erroneously held that Section 110b of Title 11 of the United States Code was applicable and permitted the termination of the lease. It held that the covenant of the lease was breached when it was adopted by the trustee, and that the landlord-lessor was entitled to re-enter the premises. The Circuit Court of Appeals also overruled the trustee's contention that the forfeiture of the leasehold estate would prevent a plan of reorganization and defeat the purposes and be contrary to the intent of Section 77 of the Bankruptcy Act because the debtor is a short switching railroad having only nine miles of main stem track, no outstanding

bonds or evidences of indebtedness; having no securities involved, all of debtor's stock being owned by Seatrain Lines, Inc.; and because it alleged that the petition was filed because the debtor desired to procure a lease of the railroad on more favorable terms (R. 94-97).

III.

Statement of the Case.

Hoboken Manufacturers Railroad Company (hereinafter referred to as "The Debtor" or "Lessee"), is a New Jersey corporation which operates a switching railroad line along the waterfront of Hoboken, New Jersey, entirely within the State of New Jersey. It is a common carrier engaged almost exclusively in the transportation of freight in interstate and foreign commerce subject to the provisions of the Interstate Commerce Act (United States Code, Tit. 49). Its line of railroad connects on the north with the line of the Erie Railroad, and through this connection and also through a float bridge it interchanges freight with other trunk line railroads serving New York Harbor. As a common carrier by railroad it is subject to the Interstate Commerce Act, and files schedules of rates and files financial reports and accounts with the Interstate Commerce Commission pursuant to that Act (R. 10).

The major part of debtor's right of way and line of railroad is held by it under a lease dated June 19, 1906, for the term of 99 years, from Hoboken Railroad Warehouse and Steamship Connecting Company (hereinafter referred to as "Lessor"). Other smaller parcels are held under leases of approximately the same date and term from Hoboken Land and Improvement Company (R. 10). On July 26, 1943, debtor filed a petition for reorganization

under Section 77 of the Bankruptcy Act (United States Code, Tit. 11, Sec. 205) in the District Court of the United States for the District of New Jersey (R. 10). On the same day said court made its Order No. 1 approving the petition, continuing the debtor in possession of its property, and restraining all persons from taking any action to interfere with such possession or with the continued operation of the railroad (R. 16).

By Order No. 5 entered on October 11, 1943, the court appointed Forrest S. Smith trustee of the debtor (R. 26). The Interstate Commerce Commission approved this appointment by its order of November 4, 1943 (R. 29), and the trustee duly qualified by filing his approved bond and oath on November 12, 1943, and thereupon, by direction of the court, entered into possession of debtor's property (R. 1). Debtor's petition for reorganization stated its assets and liabilities (R. 11, par. 7), and showed that its financial condition was seriously aggravated by several litigations. Litigation between the debtor and its landlord, Hoboken Railroad Warehouse and Steamship Connecting Company was necessary to determine debtor's liability under the lease above mentioned, which required the debtor to pay (1) a stated amount of $22,000 per year; (2) certain amounts per ton of freight transported over the lines of debtor subject to the lease and referred to as "tonnage rents"; (3) all premiums of insurance upon the leased premises, and (4) all taxes upon the demised premises or upon the lessor by reason of its ownership thereof, and of the appurtenant franchises, or upon the rent reserved by the lease which the lessee may be required to pay thereon or retain or deduct therefrom. The petition recites how it was determined that the debtor was liable to pay the lessor as part of the rent the excess profits and capital stock

taxes of the lessor, and also the income taxes levied on all the income the lessor received from the debtor.

Another very serious claim that was asserted against the debtor was that of the Pennsylvania Railroad Company, which claimed compensation for its cars at the rate of $10 per day, or ten times the established per diem rate, on such of its cars as were delivered by debtor to the vessels of Seatrain Lines, Inc. (R. 14 (c)). This claim was resolved in debtor's favor by an order of the Interstate Commerce Commission affirmed by this court in *United States of America* v. *Pennsylvania Railroad Company*, decided January 29, 1945.* It will be noticed that this decision of this court was rendered after the order appealed from had been made terminating debtor's lease.

Facts Concerning the Lease.

The major part of debtor's right of way and line of railroad is held by it under a lease dated June 19, 1906 for a term of years from Hoboken Railroad Warehouse and Steamship Connecting Company (hereinafter called "Lessor") (Ex. D-1, R. 63). Two additional pieces of land, known respectively as Plots A and B, are held under 99 year leases likewise dated June 19, 1906 from Hoboken Land and Improvement Company (hereinafter referred to as "Improvement Company"), the parent company of the debtor lessor (R. 71). By a "tie in" indenture dated January 19, 1915, debtor agreed that said leases of Plot A and Plot B should terminate on the expiration or earlier termination of the lessor lease (Ex. D-4, R. 68). Debtor also owned in fee two other parcels of land which were small but vital for the operation of the railroad.

* 89 L. Ed. 428.

Precisely what was leased in the indenture of June 19, 1906 between lessor and debtor is stated in the petition of the lessor to terminate the lease (R. 31). After describing the land on which the line of railroad was constructed, the lease specified:

> "'all rights of way, station and terminal grounds and other lands and interests in lands; all roadbed, trestles, viaducts, super-structures, poles, wires, tracks, rails, ties, freight-houses, water-stations, and tanks, turn-tables, engine-houses, car and machine shops, yards and terminals; all rolling stock and equipment of every description, including locomotives and other engines and cars; all tools, implements and machinery, and all trackage and operating contracts;" etc. (R. 31).

Article Third, paragraph 1 of the lease, contains the provision upon which the courts below decreed a forfeiture of the lease, and it provides as follows:

> "(1) The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided" (R. 64, 65).

Paragraph 5 of the lease provided:

"FIFTH. It is mutually covenanted as follows:

"If the Lessee (1) shall, at any time or times hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of thirty days, or (2) shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements hereof, and such default shall continue for the space of thirty days after notice from the Lessor of such default, and requiring the Lessee to remedy the same, then and in either of such cases, the Lessor may at any time, either

"(a) proceed by proper action or actions in the proper courts, either at law or in equity, to enforce performance of such covenants by the Lessee or to recover damages for the breach thereof; or

"(b) by notice in writing, terminate this lease, and thereupon enter into and upon the demised premises, and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its assigns, to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the Lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made; but the Lessor shall, nevertheless, have the right to recover from the Lessee any and all amounts which, under the terms hereof, may be then due and unpaid for the use of the demised premises" (R. 71).

On February 7, 1944, three months after the approval by the Interstate Commerce Commission of the appointment

of Mr. Smith as trustee, the lessor-Connecting Company served a notice on the trustee, the debtor Seatrain Lines, Inc., and the Pennsylvania Railroad Company that it would present to the court on Monday, February 14, 1944, a petition to modify the injunction contained in Orders No. 1 and No. 5 so as to permit the lessor-Connecting Company to terminate the lease between said company and the debtor dated June 19, 1906 (R. 30). The petition contained the important provisions of the lease, which are above mentioned (R. 31-33). Petitioner alleged that by reason of the premises and by reason of the qualification of the trustee of the debtor's property, and the provisions of Order No. 5 and the provisions of Section 77 of the Bankruptcy Act, the interest of the debtor in the lease and its rights and privileges have been transferred to the trustee in a proceeding to which the lessee is a party, and that the rights, duties and obligations of the lessee have been transferred, encumbered, abrogated and altered without the previous consent of the lessor, contrary to the provisions of Article Third, paragraph 1 of the lease. Petitioner stated that it desired to avail itself of its right to terminate the lease and enter upon the demised premises, and prayed that an order might be made modifying Orders No. 1 and No. 5 to permit petitioner to serve written notice upon the debtor of the termination of the lease and to forthwith enter into and upon the demised premises, and henceforth hold, possess and enjoy the same free from any rights of the trustee or the debtor or its assigns (R. 35). The hearing on this matter was held on February 14, 1944, and decision was reserved (R. 4, Item 2).

The District Court had duly extended the time within which the trustee might elect whether to adopt or reject executory contracts to June 1, 1944 (R. 36, par. 2). On May

23, 1944 the trustee served on the lessor, the debtor Seatrain Lines, Inc., and the Pennsylvania Railroad Company, notice that he would present to the court a petition for an order authorizing the trustee to continue in force executory contracts of the debtor (R. 36-38).

By order dated June 12, 1944 District Judge Fake authorized and directed the trustee to adopt and continue in force any and all leases, trackage, terminal, crossing or operating agreements, or other contracts not fully performed to which the debtor was a party, or under which it may have been obligated as of July 26, 1943, the date on which Order No. 1 approving the petition for reorganization was entered (R. 38), and the trustee immediately served on the lessor and all others having executory contracts notice of their adoption by the trustee (R. 39, 40).

Nearly two months later, and on August 4, 1944, Judge Fake filed his opinion referred to above at page 1, in which he held that the debtor's leasehold interest had been forfeited by qualification of the trustee in reorganization, the termination of the lease to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with (R. 45). On August 29, 1944 Hoboken Land and Improvement Company, lessor of the plots of land used by the railroad for railroad purposes, likewise served a notice on the debtor and the trustee and Seatrain Lines, Inc. that it would present to the court on Tuesday, September 5, 1944, a petition for an order terminating the leases to Plots A and B simultaneously with the entry of an order terminating the lease of the Connecting Company, and directing the trustee to surrender the said premises, Plots A and B, in accordance with the terms of the indenture of January 19, 1915 (R. 46-49).

We have shown on page 3 hereof that the application of the Hoboken Railroad Warehouse and Steamship Connecting Company to the Interstate Commerce Commission for authority to repossess and operate the railroad of the debtor was dismissed by the Commission on December 2, 1944, on the ground that said lessor by operation of law, and without respect to its own desires in the matter, becomes responsible for the operation of railroad properties owned by it upon termination of a lease. We have referred on page 2 hereof to the order of the District Court dated December 19, 1944, which directed the termination of all of the debtor's leases and directed that all the property in the custody of the trustee be surrendered to the lessor on December 31, 1944, at midnight.

Because the country was at war and every facility of the railroad would be needed as an operating unit for the successful prosecution of the war, paragraph 3 of the order terminating the leases (R. 59, par. 3) was inserted at the suggestion of the trustee, so that all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, excepting money in bank, cash on hand, accounts receivable, choses in action, or other intangible claims and the evidence thereof, should be delivered to said Hoboken Railroad Warehouse and Steamship Connecting Company by the trustee. "The trustee, or any other claimant, may thereupon file a claim or claims with the Clerk of this court, after first serving a copy thereof upon said company or its attorneys, for recovery of such property or its value and reasonable compensation for the use thereof, which claims will thereupon be determined by this court through reference to a Master or otherwise." This clause could only be justified by the existence of a state of war. The Circuit Court of Appeals recognized that it was a wise

provision, for it permitted the operation of the small trackage involved as a part of the main stem of the railroad in war time and it provided means whereby the contested claims could be disposed of promptly (R. 97).

IV

Assignment of Errors.

(1) The courts below erred in holding that the qualification of the trustee in reorganization by the debtor under Section 77 of the Bankruptcy Act and the adoption of executory leases by the trustee constituted a breach of the covenants of the leases whereby the rights, duties and obligations of the lessee were transferred, abrogated and altered.

(2) The courts below erred in holding that because the debtor railroad had filed a petition for reorganization under Section 77, and a trustee had been appointed and qualified, which trustee pursuant to an order of the court had adopted the executory leases; therefore all the rights in the leased premises were forfeit upon application of the lessor, even though such forfeiture would operate to defeat completely a reorganization under Section 77 of the Bankruptcy Act.

(3) The courts below erred in not holding that the forfeiture clause in the railroad leases executed in 1906 were void or unenforceable as being in conflict with the public policy expressed in the Railroad Reorganization Act (Sec. 77 of the Bankruptcy Act).

(4) The courts below erred in directing the trustee of the railroad in reorganization to surrender the railroad properties specified in the leases to the lessor without prior

approval by the Interstate Commerce Commission authorizing (1) such discontinuance of operations by the trustee and, (2) without requiring a certificate of necessity under Section 1 (18) to be issued to the Connecting Company, landlord.

POINT I.

Section 77 declared a new public policy for the preservation of railroads in financial difficulties.

At least since 1898 the Bankruptcy Act has never permitted a voluntary or involuntary petition in bankruptcy to be filed by or against a railroad company.*

The Bankruptcy Act has consistently treated railroads, together with building and loan associations, municipalities, insurance and banking corporations, in which the public has an interest above and beyond that of mere debtor and creditor, as constituting a class excepted from corporations and persons who may petition to be declared bankrupts or against whom an involuntary petition in bankruptcy may be filed.

In the depths of the depression, Congress enacted Section 77 of the Bankruptcy Act (Act of March 3, 1933, 47 Stat. 1474, U. S. C. Title 11, Section 205), which was amended slightly by the Act of June 7, 1934 (48 Stat. 911), and further revised by the Act of August 27, 1935 (49 Stat. 911), which merely simplified, clarified and rearranged the Act of 1933.

In 1933 when Section 77 was first passed, a large percentage of the railroads of the country were in desperate

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* See Act of July 1, 1898, Section 4, U. S. Code Title 11, Chap. 3, Section 22, and as last amended June 22, 1938, Chap. 575, Section 1 (52 Stat., 845).

financial condition. It is unnecessary to go into a detailed history of the Section because such history was completely reviewed in the decision of this Court in *Ecker* vs. *Western Pacific R. Corp.*, 318 U. S. 448. Suffice it to say, that prior to the enactment of Section 77, insolvent railroads might be thrown into equity receivership, either in State or Federal Courts, with necessary ancillary proceedings in every State in which the railroad had property, with accompanying administrative difficulty due to different courts asserting jurisdiction over parts of a unified system, excessive costs, inordinate delays, and harassing litigation of all kinds.

The need for railroad rehabilitation legislation under the bankruptcy clause of the Constitution was generally recognized and Section 77 "manifest[s] the intention of Congress to place reorganization under the leadership of the Commission" (I. C. C.), "subject to a degree of participation by the court" (*Ecker* vs. *Western Pacific R. Corp.*, *supra*, at p. 468).

The constitutionality of Section 77 has been determined by this Court in *Continental Illinois National Bank & Trust Co. of Chicago* vs. *Chicago Rock Island & Pacific R. Co.*, 294 U. S. 648.

It is to be observed that a proceeding for the reorganization of a railroad under Section 77 is totally different from an ordinary bankruptcy proceeding, whose principal objective is liquidation of assets and the distribution of the avails among its creditors.

It is further to be observed that the provisions of Chapter X of the Bankruptcy Act, which relate to reorganization of corporations generally, differ materially from the provisions of Section 77 of the Bankruptcy Act. Under

the provisions of Chapter X when there is a failure of acceptance of a plan, failure of consummation of a plan, or failure of proposal of a plan, the court may direct that bankruptcy be proceeded with (Section 236 of Chapter X, U. S. C. Title 11, Section 636) resulting, of course, in the eventual liquidation of the assets of the corporation which has been under reorganization. No similar provisions exist in Section 77.

The reorganization provided by Section 77 is accomplished through a plan which as Mr. Justice Sutherland said:

> "* * * cannot be distinguished in principle from the composition with creditors authorized by the act of 1867, as amended by the act of 1874. It is not necessary to the validity of either that the proceeding should result in an adjudication of bankruptcy. The constitutionality of the old provision for a composition is not open to doubt. Re Reiman (D. C.) 7 Ben. 455, Fed. Case No. 11,673, cited with approval in Hanover National Bank v. Moyses, 186 U. S. 181. That provision was there sustained upon the broad ground that the 'subject of bankruptcies' was nothing less than 'the subject of the relations between the insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief.'"*

It is to be noted that there is no provision in Section 77 for an adjudication of bankruptcy or for any procedure of any type leading to the liquidation of the assets of the railroad corporation. On the contrary, only one of two results may follow the filing of a petition for reorganization of a railroad corporation under that section. Either (1) a Plan of Reorganization may be approved and put in operation

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* *Continental Illinois National Bank etc. v. Chicago, Rock Island & Pac. R. Co.*, 294 U. S. at p. 672.

(Section 77(f), or (2) the petition may be dismissed (Section 77(e)), in which event the property is revested in the railroad corporation.

Circuit Judge Phillips said in *Van Schaick v. McCarthy*, 116 Fed. 2nd 987 (10th Cir.) at page 992:

> "Section 77 has for its main purpose the rehabilitation of the debtor by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders, under a fair and equitable plan of reorganization which shall so modify or alter the rights of both secured and unsecured creditors that the fixed charges shall be brought within the probable future earnings available for the payment thereof. During the process of reorganization it contemplates the continued corporate existence of the debtor under the control and supervision of the court."

The complete protection of the public interest in such reorganization as distinguished from the interest of the debtor and its creditors was accomplished by giving to the Interstate Commerce Commission, an administrative agency, large control over matters of business and policy involved in a reorganization. Such a provision had never been contained in a Bankruptcy Act before the enactment of Section 77. As Mr. Justice Frankfurter said in *Palmer v. Massachusetts*, 308 U. S. 79, 87,

> "The judicial process in bankruptcy proceedings under Section 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the Court to the Commissioner's approval of the Court's plan of reorganization the authority of the Court is intertwined with that of the Commission."

The public interest in a railroad reorganization is emphasized by the statement of Mr. Justice Douglas in *Institutional Investors v. Chicago M. St. P. & P. R. R.*, 318 U. S. 523, 544:

> "The nature of the capital structure, as well as the amount of the capitalization, is a component of 'the public interest.' For the 'preservation of the transportation system and the stability of its credit essential to its preservation depend not alone upon the ability of individual carriers to meet their obligations, but upon the ability of all to attract the investment of funds in their securities.'"

Mr. Justice Douglas also said in the same case at page 555:

> "The end product of this reorganization system is supposed to be a fair plan."

In *Thompson vs. State of Louisiana*, 98 Fed. Rep. 2nd, 108 (C. C. A. 8th Cir.), it was decided that the trustee of a railroad debtor in reorganization proceedings must pay the franchise taxes levied by the State. Circuit Judge Gardner, in his opinion at page 110, said:

> "It must always be borne in mind that Section 77 of the Bankruptcy Act has for its main purpose the rehabilitation of the debtor, and to that extent contemplates the continued corporate existence of the debtor. Forfeiture of franchises or accrual of penalties for nonpayment of the tax would be serious barriers to such rehabilitation, and by order of the appointing court the trustee was required to pay the cost of maintaining the corporate entity, organization and franchise of the debtor."

POINT II.

The policy declared by Section 77 is that properties of railroads in financial difficulties shall be held together by the law, the debt structure altered by a plan under the Aegis of the Interstate Commerce Commission and the court, and the reorganized railroad restored to solvent continued existence.

The provisions of Section 77 (U. S. C. Tit. 11, Section 205) which are of special importance in this case are the following:

> Section 77 (a), (b), (c), (especially (c)(2) and (c)(6)), (d), (e), (f), (g), (j) and (o), (Appendix).

It will be noted that the opinion of the District Court (R. 43), as well as the opinion of the Circuit Court of Appeals (R. 95), refer to Section 110b of U. S. C. Title 11 (Section 70b of the Bankruptcy Act) as included in and a part of Section 77. This section, which contains the provision:

> "A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereof or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

is incorporated by reference as a part of Chapter X (Chandler Act), providing for the reorganization of corporations generally.* U. S. C. Title 11, Section 506 (Section

* *Finn* v. *Meighan*, October term 1944, 65 S. Ct. 1147.

102 of the Bankruptcy Act) provides that for the purposes of Chapter X, unless inconsistent with the context,—

> "(3) 'Corporation' shall mean a corporation, as defined in this title, which could be adjudged a bankrupt under this title, and any railroad corporation *excepting a railroad corporation authorized to file a petition under section 205 of this title.*"

There is nothing in U. S. C. Title 11, Sec. 205 (Section 77 of the Bankruptcy Act), which indicates any intention that the forfeiture clause of any lease shall be enforceable under Section 77, except a lease of rolling stock equipment (Sec. 205, Par. (j) Appendix). Under the well recognized rule of statutory construction, the recognition of the right of an owner to rolling stock equipment leased or conditionally sold to take possession of such property in compliance with the provisions of the lease or conditional sales contract is an exclusion of all other lessors to take the benefit of a forfeiture clause.

> *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 617. Frankfurter J.

Furthermore, the provisions of Paragraph (a) of Section 77 giving exclusive jurisdiction of the debtor and its property wherever located to the court, and the provision of Paragraph (b) permitting the modification of the rights of creditors secured and unsecured, the retention of all or any part of the property of the debtor, the modification of liens and the curing or the waiver of defaults, and the right of a trustee to operate the business of the debtor (Par. (b) (2)) and to adopt a lease for the purposes of the reorganization, all point to the exclusiveness of Section 77 and to prove that Section 70b (Section 110b of U. S. C. Title 11)

was in no respect incorporated into the provisions of Section 77. Indeed, if the decisions of the courts below are sound, the reorganization of practically every railroad can be defeated by lessors who, for one purpose or another, will insist on the letter of the lease and demand forfeiture. Section 77 by its terms recognizes that a substantial part of railroad properties are held on lease, and such leases generally have terms similar to those involved in this case.

It is respectfully submitted that the policy of Congress, as evidenced by Section 77, is that such of the properties of railroads in financial difficulties as are necessary for their operation shall be held together during the reorganization proceeding and until a plan can be prepared satisfactory to the Interstate Commerce Commission and the court, and the plan can either be adopted or the case be dismissed.

Continental Illinois National Bank and Trust Co. of Chicago vs. *Chicago, Rock Island and Pacific R. Co.*, 294 U. S. 648, 671:

> "A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts, as they mature.'"

Group of Institutional Investors vs. *Chicago M. St. P. & P.*, 318 U. S. 523.

In *In re Central of Georgia Ry. Co.*, 48 F. Supp. 445, 449 (D. C., S. D. Georgia); aff'd in 135 F. (2d) 592, (C. C. A. Fifth), the Court emphasized that the purpose of Section 77 was to keep the railroad properties together until a plan of reorganization could be worked out.

> "To permit the steamship line to be divorced from the railway at this time is tantamount to a dismemberment of the system. If I properly understand the philosophy of section 77 of the Bankruptcy Act as amended, 11 U. S. C. A. sec. 205, under which these proceedings were taken, among other things, it was to prevent the disintegration of a railway by parceling out the mortgaged property in divisions or according to prior liens, and to preserve it as a unit of the national transportation system until reasonable opportunity has been furnished to develop and submit a plan of reorganization which will be fair and equitable to all of the interests concerned. If at the very time the trustee, his advisory committee, and the several bondholders committees are attempting to develop such a plan they are met with the threat that the steamship company, regarded by many of them as an integral part of the system, is to be withdrawn and liquidated or operated independently of the railway, they will be denied what I consider a reasonable opportunity through negotiation to reorganize the system as a whole."
>
> *Van Schaick* vs. *McCarthy*, 116 F. (2d) 987, C. C. A. 10th, 992 and 993.

If the rulings below are correct, what railroad in the future would dare to file a petition for reorganization and risk having its leaseholds forfeited?

POINT III.

Neither the filing of debtor's petition for reorganization, nor the adoption of the leases by the trustee, was a breach of the covenant against assignment; and if it were Section 77 prevented forfeiture.

Article Third, paragraph (1) of the lease provided:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor" (R. 32).

The filing of a petition by the lessee railroad for reorganization was neither a sale nor an assignment nor a transfer of the lease, nor an underletting of the demised premises. It was merely the institution of proceedings for its own rehabilitation to the end that it might be rejuvenated. After the Court had determined that the petition was properly filed, appointment of a trustee was mandatory under Section 77(c)(1) of the Bankruptcy Act.

Article Third continued:

> "This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided" (R. 32).

It cannot fairly be said that the taking of jurisdiction by the court pursuant to the provisions of Section 77 was an "unauthorized sale or transfer" of the demised premises.

Probably the principal decision on this question is that of Judge Learned Hand for the Circuit Court of Appeals for the Second Circuit in *Palmer* vs. *Palmer* (C. C. A. Second, 1939); 104 Fed. (2d) 161, cert. denied 308 U. S. 590, cited with approval in *Group of Investors* vs. *Milwaukee R. Co.*, 318 U. S. 523. *Palmer* vs. *Palmer* involved a phase of the New Haven Reorganization. Judge Hand said (p. 163):

> "A lease, being property *cum onere*, does not pass to a trustee in bankruptcy, unless he adopts it."

He remarked that if the question were to arise for the first time it might be difficult to see

> "* * * by what power the court could keep a trustee in possession, while he was determining his course, without compelling him meanwhile to fulfill the conditions imposed upon the term, for instance, the payment of any rent, secured by a right of re-entry."

But he went on to say, however:

> "Nevertheless, the contrary has been generally held; and the trustee's adoption of the term is said to 'relate back' to the beginning of the proceeding, or at least to adjudication. The reason for this is not clear. It does not follow from Sec. 70 of the Bankruptcy Act, 11 U. S. C. A. Sec. 110, which vests the trustee's title only 'by operation of law'; for title to the term vests, not by operation of law at all, but only by the trustee's adoption. Be that as it may, the trustee need not pay the rent during the

probationary period, and the court will hold off the lessor, and force him to be content with the value of the use and occupation meanwhile, though ordinarily it will fix that at the same amount as the rent. This was the result in Quincy, etc. R. Co. *vs.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, and in United States Trust Co. *vs.* Wabash Railway, 150 U. S. 287, 14 S. Ct. 86, 37 L. Ed. 1085, through so many other circumstances were thought relevant that we are not clear as to the precise scope of either ruling. But we have ourselves a number of times declared that the trustee's title relates back, or that he is liable only for use and occupation, and in some instances what we said was necessary to the result." In Re Frazin, supra, 183, F. 28, 32; In re Sherwoods, 2 Cir., 210 F. 754, Ann. Cas. 1916A, 940; Johnson *vs.* Emerson Phonograph Co., 2 Cir., 296 F. 42, 45; Heineman Corp. *vs.* Levy & Co., 2 Cir., 6 F. 2d 970, 975; In re United Cigar Stores Co., 2 Cir., 69 F. 2d 513, 515; Central Manhattan Properties *vs.* D. A. Schulte, 2 Cir., 91 F. 2d, 728, 730. Whether justified in principle or not, the doctrine has by now become too well fixed to be uprooted, especially since no change was made when the whole subject was overhauled in the Chandler Act."

It is true that the lessor did not consent by resolution of its board of directors to the filing of the petition, but the authorization for that action was a part of the law of the land and hence was either written into the lease or stated differently, the lease was subject to this provision. This is because the Constitution, Article I, Section 8, Clause 4, gave Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States and because Section 77 was enacted pursuant to this power.

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* *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific R. Co.*, 294 U. S. at p. 673.

An equally powerful reason why this statute was incorporated in the lease or the lease was executed subject to this change by Congress, is that the same article and section of the Constitution gave Congress power to regulate interstate commerce, and both the lessor and lessee in this case were subject to the provisions of the Interstate Commerce Act of 1887.* Indeed, it appears from the report of Division 4 of the Interstate Commerce Commission in this case (R. 50), that the lessor was incorporated September 17, 1895; that it constructed this railroad and operated it from September 7, 1897, until June 19, 1906, when it executed the ninety-nine year lease in question to the debtor (R. 50, 51). During all of this period of time the Interstate Commerce Act was in force and effect, but Section 1, paragraph 18, of that act, which provided that no carrier by railroad subject to this chapter shall acquire or operate any line of railroad, or extension thereof, and "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained" a certificate of present or future public convenience, was not adopted until the Act of February 28, 1920 (Chap. 91, Section 402, 41 Stat. 477). This section operated alike upon lessor and lessee for they were both chartered as common carriers by railroad. The lessor had been operating under the Interstate Commerce Act and the lessee was and still is operating under its provisions.

Furthermore, who can say that the action of the debtor in filing its petition for the appointment of the trustee by the court, or the trustee in adopting the terms of the lease, will result in the "rights, duties and obligations of the

* 24 Stat. 379.

lessee" being "encumbered, abrogated or in any manner altered"?

The adoption of the lease by the trustee was in the interest of the debtor and the public for Section 77 was adopted by Congress in the interest of both. Until a plan of reorganization is approved in the manner specified by the Act, the obligations of the lease have been adopted by the trustee for the benefit of the debtor and the public. If a plan of reorganization is approved, then the leasehold will, by operation of law, be retained by the debtor in precisely its original form and vigor or as amended or changed pursuant to the express provisions of Section 77(f) of the Bankruptcy Act.

The lessor cannot complain of this because it has been expressly held by this court that a proceeding under Section 77 is not an ordinary proceeding in bankruptcy.

> "It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised, and to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." *Continental Illinois National Bank & Trust Co.* vs. *Chicago, Rock Island & Pacific R. Co.*, 294 U. S. at pg. 676.

See also *Institutional Investors* vs. *Chicago M. St. P. & P. R. R.*, 318 U. S. 523, 554, and *Warren* vs. *Palmer*, 310 U. S. 132, 138.

Even should it be assumed that the covenant in the lease against assignment was breached by the filing of the petition for reorganization, or by the appointment of the trustee, or by the act of the trustee, with court approval, in adopting the lease, nevertheless, we insist that the forfeiture

clause contained in Article Fifth of the lease must yield to Section 77, for the forfeiture clause violates the public policy expressed in that clause. The forfeiture clause reads:

> "If the Lessee * * * shall, at any time or times hereafter during the continuance of this agreement, * * * fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements hereof, and such default shall continue for the space of thirty days after notice from the Lessor of such default, and requiring the Lessee to remedy the same, then and in either of such cases, the Lessor may at any time, * * * by notice in writing, terminate this lease, and thereupon enter into and upon the demised premises, and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its assigns, to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the Lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made" (R. 33).

This lease was made of real and personal property in the State of New Jersey where the law does not favor a forfeiture. The cases are collated in the opinion of Vice Chancellor Church in *Sparks* vs. *Lorentowicz*, 105 N. J. Eq. 18. (1929).

Only if the lease specifically and in express terms provides that it shall terminate upon bankruptcy is it held that bankruptcy works a forfeiture.

> *In re Prudential Lithograph Co.* (D. C. S. D. N. Y.), 265 Fed. 869; aff'd 270 Fed. 469; cert. denied 256 U. S. 692;
> *In re Levinson*, 295 Fed. 146 (D. C. W. D. Wash. N. D. 1923);
> *In re Gutman*, 197 Fed. 472;
> *Gazlay* vs. *Williams*, 210 U. S. 41.

Here the forfeiture clause is contrary to the spirit and intent of Section 77 which was enacted in the public interest for the very purpose of keeping railroads in operation even though they were insolvent and unable to pay their obligations as they matured.

And the fact that the Congress provided that in proceedings under Chapter X of the Act (for the reorganization of corporations generally by reference back to Section 70b (U. S. C. Title 11, Sec. 110b) of the Bankruptcy Act (Sec. 102 of the Bankruptcy Act U. S. C. Title 11 Section 502)) that a forfeiture clause in a lease should be enforced, and yet omitted such a provision for forfeiture in Section 77, relating to railroad reorganizations, is a very strong indication that such a forfeiture clause was intended to be inoperative, if not void, as against public policy in railroad reorganizations.

The Circuit Court of Appeals in the case at bar erred in holding that the lease was breached when it was adopted by the Trustee and that the landlord lessor was entitled to re-enter the premises. It cited as helpful in support of this conclusion the case of *Finn* vs. *Meighan*, 65 S. Ct. 1147. That case arose under Chapter X of the Bankruptcy Act and held that an express covenant of forfeiture in a lease is enforceable against the bankruptcy trustee whether the lessee be an individual bankrupt or a corporate debtor in reorganization *under Chapter X*. Section 70b of the Bankruptcy Act provides for such forfeiture and said section of the Bankruptcy Act, as pointed out above, is incorporated into Chapter X by reference in Section 102 of the Bankruptcy Act (U. S. C. Title 11 Sec. 502). Such incorporation, by reference or otherwise, cannot be found in Section 77 dealing with railroad reorganizations.

POINT IV.

The District Court had no power or authority to direct the trustee to surrender the railroad to the lessor in the absence of a necessary approval of the Interstate Commerce Commission (A) to the turnover by the trustee; (B) to the taking by the lessor.

The opinion of the District Court Judge concluded with a statement:

> "The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with" (R. 45).

The Interstate Commerce Commission dismissed the application of the Hoboken Railroad Warehouse & Steamship Connecting Company for authority to repossess and operate a line of railroad on the theory, which we submit is unsound, that a lessor company, by operation of law, immediately, and without respect to its own desires in the matter, becomes responsible for the operation of railroad properties owned by it upon the termination of a lease therefor (R. 56). The order of the District Judge terminating the leases (R. 58) recited that he was satisfied that the requirements of the laws relating to the continuous operation of the railroad had been complied with and provided that the lessor might take possession of the demised premises mentioned in the lease and all additional property, real or personal, acquired by the lessee during the existence of the lease and which has become part of the demised premises at midnight December 31, 1944.

The second paragraph of this order provided that upon the giving of such notice and entry in and upon the premises,

any right, title and interest of the debtor or of the trustee to the use of the demised premises and such additional property shall absolutely cease and terminate as though said lease had not been made (R. 59).

This order, which was affirmed by the Circuit Court of Appeals, was not an order dismissing the proceeding because it left in the hands of the trustee cash, accounts receivable and choses in action, but it prevented completely, if valid, any possible reorganization of the debtor. We submit that this order was contrary to the provisions of Section 1, paragraph 18, of the Interstate Commerce Act because it failed to have the support of a certificate by the Commission that the present or future public convenience and necessity permit of the abandonment by the trustee, and because it failed to have the support of a certificate from the Commission that the present or future public convenience and necessity require the operation of the railroad by the lessor.

Furthermore, since the judicial process is brigaded with the administrative process under Section 77, both are required to act positively in a matter of this importance.

The Circuit Court of Appeals in its opinion affirming the order of the District Court treated as being without merit the trustee's contention that the order allowing re-entry by the lessor was premature because it preceded consideration of a plan of reorganization. It thought that since the debtor is a short switching railroad located only in New Jersey, with no outstanding bonds, and all of its stock being owned by one corporation, that there was no abuse of the court's discretion in permitting re-entry by the landlord since it appears that the petition was filed by the debtor because it desired to procure a lease on more favorable terms. It is submitted that these matters are immaterial. When the court approved the debtor's petition as being

filed in good faith in compliance with the terms and provisions of Section 77, the debtor, as a matter of law, became entitled to the relief provided by that section. The debtor's troubles when the petition was filed were very real. They involved troubles far beyond the provisions of the lease, burdensome though some of those provisions were at that time. The debtor's position has been remarkably improved since the petition was filed for at the time the stay was applied for the operations, after the accrual of all charges and expenses, were showing a profit of between four and five thousand dollars per month under the management of the trustee (R. 99). Since that time, this court decided *United States* vs. *Pennsylvania Railroad Company** and the charge of $10.00 per day that had been claimed for the detention of cars was reduced to $1.00 per day. This is not the time or place to argue the provisions of a plan of reorganization. Under the statute the debtor had a right to attempt to reorganize and the trustee or creditors had a right to submit a plan of reorganization, but the action of the court below in terminating the leases stripped the debtor of practically all of its property, and if the orders are valid the reorganization of the debtor can never be accomplished.

It is respectfully submitted that the judgment of the Circuit Court of Appeals and the order of the District Court should be reversed and set aside.

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* U. S. , 89 L. Ed., 428, 434.

Respectfully submitted,

JAMES D. CARPENTER,
Counsel for Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor

APPENDIX.

Section 77 of the Bankruptcy Act (U. S. C. title 11, Section 205) is as follows:

REORGANIZATION OF RAILROADS ENGAGED IN INTERSTATE COMMERCE—PETITION FOR REORGANIZATION BY RAILROAD, SUBSIDIARY OF CREDITORS; VENUE; PROCEEDINGS THEREON; JURISDICTION OF COURT OVER DEBTOR AND PROPERTY

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"): *Provided*, That when any railroad, although engaged in interstate commerce, lies wholly within one State, such proceedings shall be brought in the Federal district court of the district in which its principal operating office in such State during the preceding six months or the greater portion thereof has been located. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in addition to the fees required to be collected by the clerk under other sections of this title. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this

section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and circuit courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor." Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which such other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of such other debtor; and upon the filing of such petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon such court, if it approves such petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to such other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of such corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if such corporation has not filed a petition under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and that such creditors

have claims aggregating not less than 5 per centum of all such indebtedness of such corporation and propose that it shall effect a reorganization; copies of such petition shall be filed at the same time with the Commission and served upon such corporation. Such corporation shall, within ten days after such service, answer such petition. If such answer shall admit the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If such answer shall deny either the jurisdiction of the court or any material allegation of the petition the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury and if he shall find that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise he shall dismiss the petition. If any such petition shall be so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. In case any petition shall be dismissed, neither the petition nor the answer of a debtor shall constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence without the debtor's consent, in any proceedings then or thereafter pending or commenced under this title or in any State or Federal court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors shall, prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

PLAN OF REORGANIZATION, CONTENTS; "SECURITIES", "STOCKHOLDERS", "CREDITORS", "CLAIMS" DEFINED; SUSPENSION OF STATUTES OF LIMITATION

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the

curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims which would have been entitled to priority if a receiver in equity of the property of the

debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 96 of this title shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) of this section. The running of all statutes of limitations shall be suspended during the pendency of a proceeding under this section.

PROCEEDINGS AFTER APPROVAL OF PETITION

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon August 27, 1935) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the

debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided*, That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and

shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20a of Title 49, as on August 27, 1935 or thereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful.

(4) The judge shall require the officers of the debtor or trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 25 of this title, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the debtor's estate.

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49.

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it

shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report and additional or supplemental reports at such time or times as the Commission shall desig-

nate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans; and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c), and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The circuit court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons designated or their number, as the public interest may require: *Provided, however*, That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than interveners and the manner of giving such notice.

TIME FOR FILING PLAN OF REORGANIZATION; HEARINGS BY COMMISSION; CERTIFICATION OF APPROVAL TO COURT

(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by

the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

COURT HEARING AFTER APPROVAL BY COMMISSION; ACCEPTANCE OF PLAN BY CREDITORS AND STOCKHOLDERS; CONFIRMATION OF PLAN BY COURT; VALUATION OF PROPERTY

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors for each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding,

that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such re-

jection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the

court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

BINDING EFFECT OF CONFIRMATION; DISCHARGE OF DEBTOR FROM LIABILITIES; ISSUANCE OF SECURITIES

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such

transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. The provisions of sections 77a to 77aa of Title 15 shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said sections, be treated as if they were specifically mentioned in sections 77c and 77d of Title 15, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section 78n of Title 15 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) of this section.

DISMISSAL OF PROCEEDINGS BECAUSE OF UNDUE DELAY IN REORGANIZATION

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall best by operation of law in the debtor unless otherwise provided by such order.

REVENUE ACTS INAPPLICABLE TO ISSUANCE, ETC., OF SECURITIES

(h) The provisions of subdivisions 1, 2, and 3 of schedule A of Title VIII of the Revenue Act of 1926, as amended by sections 721, 722, and 723 of the Revenue Act of 1932, and the provisions of subdivisions 8 and 9 of the same schedule A as added by sections 724 and 725 of the Revenue Act of 1932,[1] and any amendments thereto unless specifically providing to the contrary, shall not apply to the issuance, transfer, or exchange of securities or the making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section.

TRANSFER OF TITLE BETWEEN RECEIVERS AND TRUSTEES OR TO DEBTOR; "FEDERAL COURT" DEFINED

(i) If a receiver or trustee of all or any part of the property of a debtor has been appointed by a Federal or State court, whether before or after August 27, 1935, a petition or answer may be filed under this section at any time thereafter by such debtor, or its creditors as provided in subsection (a) of this section, and if such petition is approved, the trustee or trustees appointed under this section, or the debtor until such trustee or trustees are appointed, shall be entitled forthwith to possession of and be

[1] See Title 26, Internal Revenue Code, §§1800-1802, 3480-3482.

vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or receivers or prior trustee or trustees and for the payment of such reasonable administrative expenses and allowances in the prior proceedings as may be fixed by the court appointing such receiver or trustee. Whether or not a receiver or trustee has been appointed by a Federal or State court prior or subsequent to the institution of a proceeding under this section and upon the dismissal of such proceeding under this section; the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal, to transfer possession of the debtors property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section and for the payment of administrative expenses and allowances in the proceedings hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided. For the purposes of this section the words "Federal court" shall include the district courts of the United States and of the Territories and possessions to which this title is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska.

RESTRAINING OR STAYING COMMENCEMENT OR CONTINUATION OF PROCEEDINGS AGAINST DEBTOR; REMOVAL OF CAUSES; OWNERS' RIGHTS TO EQUIPMENT LEASED OR CONDITIONALLY SOLD UNAFFECTED

(j) In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continua-

tion of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: *Provided*, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated. Proceedings under this section prior to its amendment by Act of August 27, 1935, or under this section as amended by such Act, shall not be grounds for the removal of any cause of action to the United States District Court which was not removable before March 3, 1933 and any order removing any cause of action or enjoining the prosecution of any such cause of action in any court is null and void and any cause of action heretofore removed from a State court on account [sic] of this section prior to its amendment by Act of August 27, 1935, shall be remanded to the court from which it was removed. The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

CERTIFIED COPY OF ORDER CONFIRMING PLAN OR DIRECTING CONVEYANCE OF PROPERTY AS EVIDENCE

(k) A certified copy of the final order confirming a plan of reorganization, or of any other order or decree entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order or decree was made. A certified copy of an order directing the transfer and conveyance of the property dealt with by the plan as provided in subsection (f) of this section, or as specified in an order dismissing the proceedings as provided in subsection (i), shall be evidence of the transfer and conveyance of title ac-

cordingly, and if recorded shall impart the same notice that a deed, if recorded, would impart.

JURISDICTION OF COURT, DUTIES OF DEBTOR AND RIGHTS OF CREDITORS SAME AS IN VOLUNTARY BANKRUPTCY

(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

"RAILROAD CORPORATION" AND "PERSON" DEFINED

(m) The term "railroad corporation" as used in this section means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment. Wherever used in this section the term "person" shall include an individual, corporation, partnership, association, joint-stock company, unincorporated organization, or a government or political subdivision thereof.

CLAIMS OF EMPLOYEES FOR PERSONAL INJURIES AND CLAIMS OF SURETIES AS PREFERRED CLAIMS; CHANGE IN WAGES OR WORKING CONDITIONS REGULATED; MOVING SHOPS, ETC., REGULATED

(n) In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a rail-

road corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended. No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

ABANDONMENT OR SALE OF LINES OR PROPERTY

(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by chapter 1 of Title 49, as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and

carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection as public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

SOLICITATION OF PROXIES OR AUTHORIZATIONS

(p) It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject, any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relat-

ing to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission after hearing by order authorizes such solicitation, use, employment, or action: *Provided, however*, That nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters. The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respecting such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this sub-

section as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof. It shall be unlawful for any person to solicit any such proxy, authorization, or the deposit of any such claim or interest or to use, employ, or act under or pursuant to any such proxy, authorization, or deposit agreement which has been solicited or obtained prior to the institution of such proceedings in violation of the rules and regulations so prescribed.

Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application shall be made under oath, signed by, or on behalf of, the applicant by a duly authorized agent having knowledge of the matters therein set forth. The Commission may modify any order authorizing such solicitation, use, employment, or action by a supplemental order, but no such modification shall invalidate action previously taken, or rights or obligations which have previously arisen, in conformity with the Commission's prior order or orders authorizing such solicitation, use, employment, or action.

The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subsection (p) or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath, or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any such facts, conditions, practices, or matters as it may deem necessary or proper to aid in the enforcement of the provisions of this subsection (p), in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legis-

lation concerning the matters to which this subsection relates.

Any person who willfully violates any provision of this subsection, or any rule or regulation made thereunder the violation of which is made unlawful; or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed hereunder or under any rule or regulation authorized hereby, which statement is false or misleading with respect to any material fact, shall be guilty of a misdemeanor, and on conviction in any United States court having jurisdiction, shall be punished by a fine of not less than $1,000 nor more than $10,000 or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

The provisions of this subsection (p) shall not be applicable to any person or committee which has begun to solicit, obtain, or use proxies, authorizations, or deposit agreements prior to August 27, 1935, in connection with proceedings under this section as in force prior to such date or receivership proceedings against a railroad then pending in any State or Federal court, unless such person or committee makes application to the Commission and receives authority to act as in this subsection provided, in which event the provisions of this subsection (p) shall be applicable to such person or committee, but such authorization shall not be upon terms which shall invalidate any action theretofore taken, or any rights or obligations which have theretofore arisen: *Provided*, That with respect to committees which are not subject to this subsection (p) the judge shall scrutinize and may disregard any limitations or provisions of any deposit agreements, committee, or other authorizations affecting any creditor stockholder acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he

finds to be unfair or not consistent with public policy, including the collection of unreasonable amounts for compensation and expenses.

APPLICATION OF LAW GRANTING POWERS TO COMMISSION

(q) The provisions of section 12 of Title 49 shall be applicable to enable the Commission to perform its duties under this section and the provisions of such section shall apply to the debtor, any subsidiary or affiliated company, or any other person as herein defined.

SEPARABILITY CLAUSE

(r) If any provision of this section, or the application thereof to any person or circumstances, is held invalid, the remainder of this section, or application of such provision to other persons or circumstances, shall not be affected thereby.

PENDING PROCEEDINGS AS GOVERNED BY AMENDMENT OF SECTION

(s) Proceedings pending under this section on August 27, 1935, shall continue under, and be governed by, the provisions of this section as amended by Act of August 27, 1935: *Provided*, That the amendment of this section by Act of August 27, 1935, shall not invalidate any action taken before August 27, 1935, pursuant to this section as it existed prior to such date. July 1, 1898, c. 541, § 77; Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474; Aug. 27, 1935, c. 774, 49 Stat. 911; June 26, 1936, c. 833, 49 Stat. 1969; Aug. 11, 1939, c. 689, 53 Stat. 1406.

Section 1, Paragraph (18) of the Interstate Commerce Act (U. S. C. title 49, Sec. 1, Par. (18)) provides as follows:

"Extension or abandonment of lines; certificate required. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate

any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."